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No. 1054 [redacted] 60

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1922.

JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER SECTION 206 OF THE TRANSPORTATION ACT OF 1920, PETITIONER,

against

J. M. CURRIE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

THOS. W. DAVIS,
DOUGLAS McKAY,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1922.

JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER SECTION 206 OF THE TRANSPORTATION ACT OF 1920, PETITIONER,

against

J. M. CURRIE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, James C. Davis, agent appointed by the President under section 206 of the Transportation Act of 1920, deeming himself aggrieved by a certain decree or order of the Supreme Court of the State of South Carolina, entered in the case of J. M. Currie, respondent, against James C. Davis, agent appointed by the President under section 206 of the Transportation Act of 1920, appellant, which decree or order became final for the purposes of review in this court on the 13th day of April, A. D. 1923, prays this Honorable Court to issue its writ of certiorari as authorized so to do by the provisions of section 237 of the Judicial Code as amended by the Act of Congress of 23d December, 1914, c. 2, Act 6th

September, 1916, c. 448, Sec. 2, and Act 17 February, 1922, c. 54, 42 Stat., 366, addressed to the Supreme Court of the State of South Carolina commanding it to certify and transmit to this court, on a day therein named, a full and complete transcript of the record and all proceedings had in the various courts of the State of South Carolina in said cause, in so far as the same appear of record or on file in said Supreme Court of the State of South Carolina, to the end that said cause may be reviewed and determined by this court, as provided by law, and that petitioner may have such relief and remedy in the premises as this court may deem appropriate, and justice and right may require.

The reasons relied on for the issuance of said writ and upon which your petitioner believes that a writ ought to be issued, and which will be more fully stated hereafter, may be summarized as follows:

I.

1. Because the Supreme Court of the State of South Carolina misinterpreted the Federal Control Act of 21st March, 1918 (40 U. S. Stat., 451, C. 25, sec. 10), and the proclamations of the President issued pursuant thereto, and the general orders promulgated by the director general of railroads pursuant to the authority duly vested in him, particularly general orders Nos. 8 and 50 (U. S. Railroad Administration Bulletin No. 4, pp. 167 and 334), in holding that respondent was entitled to recover damages against the United States Railroad Administration for injury to feelings and humiliation within the meaning of the act and the proclamations and general orders issued pursuant thereto at the time the injury was inflicted.

2. Because the opinion of the Supreme Court of the State of South Carolina is contrary to the decisions of this court and of the inferior Federal courts, construing the nature and extent of recovery permitted against the United States Railroad Administration under the terms of the Federal Control Act, and amplifies and extends the right of recovery beyond the limitations of the act.

II.

The matters involved and the facts and circumstances are as follows:

On 31st August, 1919, at Florence, S. C., the respondent purchased a ticket, entitling him to transportation as a passenger on a line of railroad then in charge of the Director General of Railroads of the United States Government, from Florence, S. C., to Mayesville, S. C. He then presented himself at the gate through which passengers were required or invited to pass in order to board trains. The gate was in charge of a gatekeeper, a Government employee, to whom the respondent showed his ticket. The gatekeeper refused him passage through the gateway and then, according to the respondent, "shoved" him back, causing him to fall and bruise his arm, in the presence of a "crowd of people." Thereafter the respondent made four attempts, at separate times, to get through the gate to his train. Each time he was threatened with physical violence and cursed by the gatekeeper. He then went to the ticket agent, told him of important business plans and arrangements that made it necessary for him to get to Mayesville, S. C., on the train for which he had bought his ticket. The ticket seller suggested that he try getting through another gate about

seventy-five feet away, but which, as respondent claimed, "was not for passengers to go through." He told the ticket agent he didn't care to steal through, as he had bought his ticket. He then met Captain Johnson, a conductor for the line of railroad upon which he had taken passage, who, upon being apprised of the situation, advised him to try the gateman again. He then went back to the gate, again showed the gateman his ticket, and was again repulsed with rude, threatening and insulting language. After that he made one or two more attempts to get through the gate, with the same result.

The respondent brought suit for damages because of the wrongful and wilful violation of his rights by the gatekeeper against the petitioner, claiming damages for business losses caused by the enforced delay, and for the wounded feelings and the humiliation suffered. Due objection was made in the trial court that the evidence as to business losses was irrelevant and insufficient, and that as to wounded feelings and humiliation was incompetent, since a recovery of this nature could not be had against the United States Railroad Administration. The trial court overruled these grounds and submitted the case to the jury, which found a verdict of $10,000.00.

The Supreme Court of South Carolina, on appeal, overruled petitioner's exceptions to the allowance of damages for wounded feelings and humiliation, but sustained the exceptions as to the allowance of damages for business losses on the evidence offered, and therefore reversed the judgment, unless the plaintiff should remit from the face of the judgment $1,340.00, which represented alleged business losses, within ten days after the remittitur went down to the lower

court. The court, however, before it lost jurisdiction of the judgment, stayed the remittitur, took under consideration a petition filed by your petitioner, reconsidered its opinion, and on 13th April, 1923, filed an amended decree, whereby it provided that the respondent should file his stipulation of remission in the Supreme Court within ten days, in order that the judgment might become a final judgment in and of that court.

On the 23d day of April, 1923, the respondent filed in the Supreme Court a stipulation, acquiescing in the condition imposed by the decree of the court, remitting from the face of the judgment the sum of $1,340.00, whereupon the decree became a final judgment of the Supreme Court of the State of South Carolina.

III.

The sole question presented for review by this court is, Can damages for humiliation and wounded feelings be awarded the respondent against the petitioner, the United States Railroad Administration, under the provisions of the Federal Control Act, the proclamations of the President and the general orders of the director general pursuant thereto? This point having been raised in his appeal to the Supreme Court of the State of South Carolina, and having been decided adversely to the rights and interest of your petitioner and contrary to the decisions of this court, a review thereof is hereby prayed.

WHEREFORE, because and by reason of the general interest in and the general importance of the issues involved, and for the other reasons above stated, your petitioner prays

that a writ of certiorari to review the cause be issued to said Supreme Court of the State of South Carolina, as in such case is provided by section 237 of the Judicial Code as amended by the act of Congress of 23d December, 1914, c. 2, act of 6th September, 1916, c. 448, sec. 2 and act 17th February, 1922, c. 54, 42 Stat., 366.

JAMES C. DAVIS,
Agent Appointed by the President under Section 206 of the Transportation Act of 1920,
Petitioner,

By THOS. W. DAVIS,
Wilmington, N. C.,

DOUGLAS McKAY,
Columbia, S. C.,
His Attorneys.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1922.

JAMES C. DAVIS, *Agent Appointed by the President under Section 206 of the Transportation Act of 1920, Petitioner,*

against

J. M. CURRIE, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

The essential facts involved in this application have been referred to in the petition. J. M. Currie, by the unlawful and wilful actions of a gateman in the employ of the United States Railroad Administration, was caused to miss his train for which he had purchased a ticket. Paragraph IX of the complaint summarizes his claim for damages as follows:

> "That said defendants by and through said R. L. Crosswell wilfully and wantonly and maliciously prevented plaintiff from taking this train, cursed, assaulted and abused plaintiff, caused him great humiliation, the loss of two days' time, and damaged him by reason of his failure to take up said machinery on demurrage and by reason of having his laborers idle on account thereof, and that the acts of the said defendants in so refusing to admit plaintiff to his train and in so cursing, assaulting, and abusing plaintiff, jointly and severally, caused and occasioned plaintiff damages in the sum of $50,000.00."

By the very allegations of his complaint, the respondent bases his claim upon the wilful, wanton, and malicious acts of the gateman Crosswell, and for such acts seeks to recover.

DAMAGES CANNOT BE RECOVERED AGAINST THE GOVERNMENT FOR WOUNDED FEELINGS AND HUMILIATION ARISING OUT OF A WANTON, WILFUL, AND MALICIOUS ACT OF ITS AGENT.

The Supreme Court of South Carolina determined that the verdict of $10,000 was made up of $1,340 for actual business losses and $8,660 for humiliation and injured feelings, and there is affirmed a judgment in the latter amount against the United States Government because the humiliation and wounded feelings were caused by delicts of a servant who, according to respondent's complaint, acted "wilfully and wantonly and maliciously."

General Order No. 8 of the director general of railroads provided in part as follows:

> "Now that the railroads are in the possession of the Government, it would be futile to impose fines for violations of said laws and orders upon the Government, therefore it will become the duty of the Director General in the enforcement of said laws and orders to impose punishments for wilful and inexcusable violations thereof upon the person or persons responsible therefor, such punishment to be determined by the facts in each case." (U. S. Railroad Administration Bulletin No. 4, pp. 167-168.)

General Order No. 50, quoting the requisite section of the Federal Control Act and making provision for suits thereunder, in the portions pertinent hereto provided as follows:

"Whereas by the proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said proclamations that 'until and except so far as said director 'shall from time to time otherwise by general or 'special orders determine, such systems of transporta-'tion shall remain subject to all existing statutes and 'orders of the Interstate Commerce Commission and 'to all statutes * * * but any orders, general or 'special, hereafter made by said director shall have 'paramount authority and be obeyed as such'; and

"Whereas the act of Congress, called the Federal Control Act, approved March 21, 1918, provided that 'carriers while under Federal control shall be sub-'ject to all laws and liabilities as common carriers, 'whether arising under State or Federal laws or at 'common law, except in so far as may be inconsistent 'with the provisions of this act or any other act ap-'plicable to such Federal control, or with any order 'of the President'; * * *

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the director general of railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding, but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; *provided, however,* that this order

> shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures." (*Id.*, pp. 334, 335).

Thus it is apparent that, under neither the Federal Control act nor the General Orders issued pursuant thereto, did the United States Government permit itself to be sued for the wilful, wanton, malicious acts of its servants, for which the damages awarded would be punitive in nature. *Missouri Pacific R. Co. vs. Ault,* 256 U. S., 554; 65 L. Ed., 1087; *Massey vs. Hines* (S. C.), 108 S. E., 181; *Ginn vs. Hines* (S. C.), 103 S. E., 548.

Merely as evidence that the spirit and atmosphere of the action and of the trial was one of punishment of the petitioner for the malice and wantonness of his servant, note the language of portion of the order of the trial judge refusing a new trial:

> "This may appear to be rather a large actual compensation for the wrongs here complained of, but, if the rights of the law abiding citizens were properly respected, there would be less litigation on the civil side of the court, and fewer prosecutions on the criminal side, while the criticising public which now charges the law with failure would probably find the solution of many public ills in a better conception of the rights of the individual citizen and through insistence that none shall invade those rights with impunity or in contravention of the law which governs and protects all alike." (Case, p. 27, f. 105.)

This language shows clearly that the trial judge was imbued with the idea that a verdict rendered as punishment for a wilful act could be found against the Government. This

court, however, in *Missouri Pacific R. Co. vs. Ault,* 256 U. S., 554, 654; 65 L. Ed., 1087, 1092, has decided: "The purpose for which the Government permitted itself to be sued was compensation, *not punishment.*" (Italics ours.) It does not consent to be sued in a class of cases where there is alleged element of moral wrong on its part, or in any class of cases involving the element of moral wrong where the intent or motive has its origin in a lack of consideration for the rights of an individual, and where the damages awarded are based upon mental anguish or humiliation attributable to such acts.

This is based upon an interpretation of Federal law, and hence the adjudications of the Federal courts are binding. In the case of *Pearl Dougherty vs. Payne as Director General of Railroads,* 276 Fed., 451, the District Court for the Southern District of Florida decided as follows:

> "This cause comes on for hearing upon the motion for leave to file an amended declaration.
>
> "Heretofore on May 27th, inst., a demurrer was sustained to the declaration.
>
> "The 5th ground of the demurrer raised the question whether an action for malicious prosecution could be brought against the Director General of Railroads, as such officer, for the actions of one of the employees of a railroad system under his control. A careful study of the acts of Congress covering the governmental control of transportation systems seems to me to answer this question in the negative. Such being my view, no purpose would be served in granting the motion to amend and it will therefore be denied."

This decision was handed down 9th June, 1921, and, as we are informed, the action was brought for the malicious

prosecution of a linen counter, employed by the Pullman Car Lines at Jacksonville, Florida. Her arrest was procured at the instance of employees of the Pullman lines. She was acquitted by a jury and brought suit for malicious prosecution.

In the case of *Hines vs. Bowling,* 272 Fed., 230, suit was instituted to recover damages for malicious prosecution. The question involved in this case was referred to by Judge Boyd in his opinion, but was not passed upon. Judge Boyd stated:

> "The question which arises is whether or not, under such circumstances, malice or wrongful motive can be imputed to the Chief Executive, who was performing an official function, or to the director general, his *alter ego,* and made the ground of damages at the instance of an individual in a suit against the latter. However, this proposition was not relied upon, nor argued by defendant's counsel, and we do not deem it necessary to pass upon it in order to dispose of the case."

In *State vs. Hines, Agent,* 228 S. W. Rep., 667, the Court of Civil Appeals of Texas held an action for penalties did not lie against the director general of railroads for failure to keep well lighted the water closets and adjacent depot grounds maintained at several passenger stations of a railroad taken over by the director general of railroads. The statutes of the State of Texas imposed a penalty for failure to keep these places lighted.

We respectfully submit that the question of humiliation being a component element of actual damages has not been approached by the courts in this country from the same angle as is here presented. It cannot be denied that, generally

speaking, awards for humiliation have been considered compensatory rather than punitive, but a careful analysis of the situation here presented must indubitably lead to the conclusion that an award for humiliation of the nature herewith contended is nothing more nor less than an award of punitive damages under a camouflage, and that such a verdict cannot stand against the sovereign power. In *Missouri Pacific R. Co. vs. Ault, supra,* we find the following:

> "The contention that the director general, being the carrier, is liable for the penalty imposed by the Arkansas Statute, is rested specifically upon the clause in section 10, to the effect that the carriers 'shall be 'subject to all laws and liabilities as common carriers, 'whether arising under State or Federal laws or at 'common law,' and the provision in section 15, that the 'lawful police regulations of the several States' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, State and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States, arising out of the operation of the railroad, were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail to perform the legal obligations imposed. The Government undertook, as carrier, to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law, but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties, or to per-

mit any other sovereignty to punish it. Congress is not to be assumed to have adopted the methods of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees. The director general adopted a much more effective and direct method: 'Now that the railroads 'are in the possession and control of the Government, 'it would be futile to impose fines for violations of said 'laws and orders upon the Government, therefore it 'will become the duty of the director general in the 'enforcement of said laws and orders to impose pun-'ishment for wilful and inexcusable violations thereof 'upon the person or persons responsible therefor.' General Order No. 8, *id.*, p. 167.

"The purpose for which the Government permitted itself to be sued, was compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order: 'Provided, however, that this order shall not 'apply to actions, suits, or proceedings for the recovery 'of fines, penalties, and forfeitures.' Wherever the law permitted compensatory damages, they may be collected against the carrier while under Federal control. Such damages may reasonably include interest and costs. See *Hines vs. Taylor,* — Fla., —, 84 So., 381. But double damages, penalties, and forfeitures, which do not merely compensate but punish, are not within the purview of the statute. See *Hines vs. Taylor, supra; Jackson-Tweed Lumber Co. vs. Southern R. Co.,* 113 S. C., 236; 101 S. E., 924. The amount recovered in the present case over and above the wages due and unpaid, with interest, is in the nature of a punishment. It is called a penalty in the State statute. The Supreme Court of Arkansas had held that it was not technically a penalty, de-

claring: 'It is allowed for a double purpose—as a com-'pensation for the delay, and as a punishment for the 'failure to pay. It is composed of all the elements 'and serves all the purposes of exemplary damages.' *Leep vs. St. Louis, I. M. & S. R. Co.*, 58 Ark., 407, 440, 441; 23 L. R. A., 264; 41 Am. St. Rep., 109; 25 S. W., 75. But whether in a proceeding against the Director General it shall be deemed compensation or a penalty presents a question not of state, but of Federal law. *Whatever name be applied, the element of punishment clearly predominates, and Congress has not given its consent that suits of this character be brought against the United States.*" (Italics ours.)

An excellent statement of the principle herewith contended for is found in the case of *Arizona Copper Co. vs. Burciago* (Ariz.), 177 Pac., 29-33, where the Supreme Court of Arizona, in determining what was meant by compensatory damages under the Workmen's Compensation Act of that State, said:

"With equal clearness humiliation and mortification can only result from wrong to the person injured through the intended act of the defendant, and where humiliation and mortification furnish the ground for recovery, the right of recovery depends upon whether the defendant purposely and designedly committed the wrong, thereby intending to humiliate the plaintiff and outrage his feelings. The damages recoverable for such wrong are punitive in character and furnish no ground for recovery in this kind of action, for the reason that such character of damages does not amount to actual damages but to punitive damages."

This might well have been written of the case herein, where the judgment of the State court is punitive rather than compensatory in nature, and is clearly opposed to the intent of the Federal statute as construed by this court.

As persuasive authority directly in point here and in line with what this court has declared in the *Ault* case, we call attention to *Davis, Agent, vs. McMillan* (Ga.), 115 S. E., 494, decided 20th January, 1923, by the Supreme Court of Georgia. In passing on the judgment of the lower court, which overruled a demurrer to a complaint against James C. Davis, Agent, based on malicious prosecution, the court said:

> "As we construe the petition to which the demurrer was interposed, it is purely a suit which seeks to recover damages for an act based upon malice. Without the element of malice, the entire structure of the suit must collapse. All parts of the petition which sought to recover what was in terms called punitive damages were stricken, and although, under the ruling of the trial court and the court of appeals, the recovery was restricted to what was termed 'compensatory' damages, we think that the name 'compensatory,' as applied therein, does not change the basic fact that the recovery is sought for an act which can authorize only punitive damages. Any damages recovered under the petition as it stands would amount to a penalty for a malicious act, and for this neither the United States, nor its agent, the Director General of Railroads, can be held liable."

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

THOS. W. DAVIS,
Wilmington, N. C.;
DOUGLAS McKAY,
Columbia, S. C.,
Attorneys for James C. Davis, Agent Appointed by the President under Section 206 of the Transportation Act of 1920.

NOTICE.

To Messrs. L. D. Jennings and M. M. Weinberg, Attorneys for Respondent:

You will please take notice that the foregoing petition for a writ of certiorari and brief in support thereof will be presented to the Supreme Court of the United States on Monday, 14th day of May, 1923, at twelve o'clock noon, or as soon thereafter as counsel can be heard.

THOS. W. DAVIS,
DOUGLAS McKAY,
Attorneys for the Petitioner, James C. Davis, Agent Appointed by the President under Section 206 of the Transportation Act of 1920.

Service of a copy of the above notice, petition, and brief is acknowledged, this 27th day of April, 1923.

L. D. JENNINGS,
Attorney for J. M. Currie, Respondent.

[Endorsed:] In the Supreme Court of the United States. October term, A. D. 1922. James C. Davis, Agent appointed by the President under Section 206 of the Transportation Act of 1920, Petitioner, *against* J. M. Currie, Respondent. Petition for writ of certiorari to the Supreme Court of South Carolina, and brief in support of petition. Law offices Douglas McKay, Liberty Bank Building, Columbia, S. C.

(9428)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. [redacted]60

JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER THE TRANSPORTATION ACT OF 1920, PETITIONER,

versus

J. M. CURRIE, RESPONDENT.

ON CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF OF JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT.

DOUGLAS McKAY,
THOS. W. DAVIS,
Attorneys for Petitioner.

(28,604)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 322.

JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER SECTION 206 OF THE TRANSPORTATION ACT OF 1920, PETITIONER,

against

J. M. CURRIE, RESPONDENT.

ON CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF FOR PETITIONER.

Statement of Facts.

This is a proceeding to review, on writ of certiorari granted by this court, a judgment of the Supreme Court of South Carolina sustaining a judgment against the Director General of Railroads in the sum of $8,660 for humiliation, mental

anguish, and injury to feelings, alleged to have been suffered by a passenger, arising out of the willful, wanton and malicious acts of a train gatekeeper, and without any substantial physical injury or other element of recoverable damages being shown.

The facts, as they appear from respondent's testimony (R., pp. 4-5), are that on August 31, 1919, at Florence, South Carolina, respondent purchased a ticket entitling him to transportation as a passenger on a line of railroad, then in charge of the Director General of Railroads, from Florence to Mayesville, South Carolina, and then presented himself at the gate through which passengers usually passed in going to board trains; that the gate was in charge of a gatekeeper, an employee of the Director General, to whom respondent showed his ticket, whereupon the gatekeeper looked at his ticket, handed it back to respondent, and reached over and gave him a "shove," causing him to fall and bruise his arm in the presence of a crowd of people; that respondent shortly thereafter made four separate attempts to go through the gate to his train, and each time was threatened and cursed and told that he could not go through the gate; that after one of such rebuffs respondent went to the ticket agent and told the latter of his necessity of getting on the train to fulfill important business arrangements, and the ticket agent suggested that he try getting through another gate about 75 feet away, but which, as respondent claimed, was not for passengers to use; whereupon respondent said that he did not want to steal through, as he had bought his ticket; that when plaintiff went back to the gateman and told him what the ticket agent had said about trying the gatekeeper again, the gateman replied that he "didn't care what the ticket agent or Mr. Hare,

the superintendent (of the railroad) or anybody else said, he wouldn't let him through." There was other testimony, which was not disputed (R., p. 7, f. 11), that the other gate which the ticket agent suggested that respondent go through was used by a great many passengers going in and out.

Respondent brought this suit against the Director General of Railroads for damages because of the "willful, wanton, and malicious" violation of his rights by the gatekeeper, claiming damages in his complaint (R., p. 3, f. 4) for humiliation and wounded feelings, and also for business losses caused by the enforced delay, as alleged in the complaint. Timely objection was made in the trial court that the evidence as to business losses was incompetent, and that there could be no recovery for humiliation and injury to feelings, but the trial court overruled such objections and submitted the case to the jury, which rendered a verdict for respondent of $10,000. The Supreme Court of South Carolina, on appeal (R., pp. 22-24, ff. 34-36), sustained petitioner's exceptions as to the allowance of damages for business losses under the evidence, but (R., pp. 25-28) overruled his exceptions to the allowance of damages for wounded feelings and humiliation, which was the only other element of damage claimed, and reversed the judgment unless plaintiff should remit from the face of the judgment $1,340, which represented the alleged business losses, and file stipulation of remission in the Supreme Court within 10 days, and thereafter, within such period, respondent filed stipulation in the Supreme Court remitting the sum of $1,340 from the original judgment of $10,000, whereupon the judgment of the Supreme Court of South Carolina for respondent in the sum of $8,660 became final.

Assignment of Error.

The judgment against the Director General of Railroads for wounded feelings and humiliation arising out of a wanton, willful, and malicious act of his servant is unauthorized, involving, essentially, the infliction of a penalty upon the Government.

BRIEF AND ARGUMENT.

The judgment against the Director General of Railroads is unauthorized because it involves, substantially and essentially, the infliction of a severe penalty upon the Government, under the guise of compensatory damages, for humiliation and mental anguish, on account of the willful acts of its agent.

The Supreme Court of South Carolina determined (R., pp. 22 and 28) that the verdict of $10,000 was made up of $1,340 for actual business losses and damage and $8,660 for humiliation and injured feelings, and affirmed the judgment in the latter amount against the United States Government because of humiliation and wounded feelings caused by delicts of a servant of the Government, who, according to the complaint, acted "willfully, wantonly, and maliciously."

It is clear, we think, from the record that liability was asserted against the Government solely on account of the willful and malicious acts of its agents, and that the case was tried on that theory, and the Government in fact penalized by the infliction of a large judgment against it for alleged humiliation and mental anguish, whether the damages awarded be characterized as compensatory damages or as a

penalty. The gist of the allegations of negligence and damage sustained is contained in the ninth paragraph of the complaint (R., p. 3), reading:

> "That said defendants, by and through said R. L. Croswell, *willfully and wantonly and maliciously* prevented plaintiff from taking his train, cursed, assaulted and abused plaintiff, caused him great humiliation, the loss of two days' time, and damaged him by reason of his failure to take up said machinery on demurrage and by reason of having his laborers idle on account thereof, and that the acts of said defendants in so refusing to admit plaintiff to his train and in so cursing, assaulting, and abusing plaintiff, jointly and severally, caused and occasioned plaintiff damage in the sum of $50,000.00."

It will be noted that the only damage claimed, aside from loss of time and interference with business plans, which was not allowed by the State Supreme Court, was for humiliation. Not only was willfulness and maliciousness charged in the complaint, but it was in several places in the trial court's charge submitted to the jury, and while the jury were charged that they could not allow punitive damages, the question of the Government's alleged willful and malicious conduct was submitted to them in a number of places (R., pp. 10 and 11, ff. 16 and 17).

Further, as indicating that the spirit and atmosphere of the action and trial was one of punishment of the petitioner for the willful, wanton and malicious acts of his servant, we call attention to the language of a part of the order of the trial judge (R., p. 18, f. 27) refusing a new trial, reading:

> "This may appear to be rather a large actual compensation for the wrongs here complained of, *but, if the rights of the law abiding citizens were properly respected,* there would be less litigation on the civil side of the court, and fewer prosecutions on the criminal side,while the criticising public which now charges the law with failure would probably find the solution of many public ills in a better conception of the rights of the individual citizen *and through insistence that none shall invade those rights with impunity* or in contravention of the law which governs and protects all alike."

The italicized portions of the foregoing (italics ours) clearly indicate that the trial judge thought the very large verdict was justified as a punishment for not properly respecting the rights of citizens and as a deterrent against the invasion of such rights with impunity. This is the very essence of the doctrine of punitive damages as enunciated by the courts, including those of South Carolina.

In *Watts v. Southbound R. Co.,* 38 S. E., at page 242, the South Carolina Supreme Court said:

> "Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and, indeed it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others."

Likewise in *Oliver v. Columbia, N. & L. R. Co.* (S. C.), 43 S. E., pages 420-421, the same language was repeated, and it was stated that such damages were sometimes spoken

of as "vindictive" and "exemplary" damages and were also sometimes referred to as "smart money" and "blood money."

The authorities in other jurisdictions are to the same effect:

> "Punitive damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton, and reckless manner. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief, towards the plaintiff, or of reckless and criminal indifference to his rights. When these elements are present, damages commensurate with the injury may be allowed by way of punishment to the defendants. But these damages are awarded on the grounds of public policy, for example's sake, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. * * * Compensatory damages are based upon injuries suffered by the plaintiff, while punitive damages are awarded upon wrongs intended by the defendants."
>
> *Cotton v. Fisheries Products Co.*, 106 S. E., 487-488 (N. C.).

It is well established under the decisions of the courts that damages of a punitive nature cannot be awarded against the United States Government on account of the willful and malicious acts of its agents in the operation of railroads taken over under Federal control. *Missouri Pacific Railroad Company v. Ault*, 256 U. S., 554; 65 L. Ed., 1087; *Matthews v. Davis, Director General* (S. C.), 117 S. E., 642; *Ginn v. Hines* (S. C.), 103 S. E., 548; *Massey v. Hines* (S. C.), 108 S. E., 181. The act of Congress taking over the railroads and the order of the Director General of Railroads made there-

under, as construed by the decisions of this court, clearly show that damages in fact of a non-compensatory character cannot be awarded against the Director General on account of the willful acts of his agent, in whatever way they may be characterized by the local law. As stated by this court in *Missouri Pacific Railroad Company v. Ault, supra,* in discussing this question:

> "The Director General adopted a much more effective and direct method: 'Now that the railroads are in the possession and control of the government, it would be futile to impose fines for violations for said laws and orders upon the government, therefore it will become the duty of the Director General in the enforcement of said laws and orders *to impose punishments for willful and inexcusable violations* thereof upon the person or persons responsible therefor.' General Order No. 8, *id.*, p. 167."

Likewise, in General Order No. 50-A, the Director General of Railroads specified in what actions the Government could be sued in the operation of railroads and specifically excluded actions for the recovery of fines, penalties and forfeitures, which, as this court clearly indicated in the Ault case, embraces all recoveries or impositions where "the element of punishment clearly predominates." The pertinent part of General Order No. 50, as amended by No. 50-A, reads:

> "Whereas by the proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said proclama-

tions that 'until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commisson and to all statutes * * * but any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such;" and

"Whereas the act of Congress, called the Federal Control Act, approved March 21, 1918, provided that 'carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control, or with any order of the President;"

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding, but for Federal control might have been brought against the carrier company, shall be brought against the Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of *fines, penalties, and forfeitures.*"

While, as noted in the statement of facts, the complaint alleged that the gateman "shoved" plaintiff and he fell and

sustained a "minor" bruise, yet both the complainant and plaintiff's evidence show that he sustained no personal injury of any substance or moment and make it apparent that the allegation as to injury was made only for the purpose of hanging thereon a large recovery of alleged "compensatory" damages against the Government for mental anguish and humiliation, and the result of the trial in the State court shows that this expectation was eminently justified. The Supreme Court of South Carolina, therefore, properly assumed, as it did, that the recovery of $8,660, which it allowed to stand after eliminating the part of the verdict for actual damages for business losses, represented damages for mental anguish and wounded feelings, and in upholding the recovery against the Director General it held that damages for mental anguish might be recovered even in the absence of any substantial physical injury (R., p. 26, f. 39). While we concede that damages may ordinarily be awarded for mental anguish or wounded feelings when accompanied by substantial physical injury, and that such damages are ordinarily denominated compensatory rather than punitive, we submit that a careful analysis of the facts and record in this case leaves no room to doubt that the damages awarded against the Director General herein were clearly punitive in their nature and purpose.

A case involving somewhat similar questions was recently decided by the Supreme Court of Appeals of Virginia, *Hines, Director General, v. Gravins,* 118 S. E., 114 (Va.), decided June 14, 1923. It appears from a former decision in the case (112 S. E., 869) that the action was brought against the Director General to recover actual and punitive damages for scandalous words uttered by an agent of the Director General

within the scope of his authority. In the decision first rendered the Virginia court held that punitive damages could not be recovered against the Director General in such a case, citing, among other decisions, the decisions of this court in the *Ault* case and of the Supreme Court of South Carolina in *Rowell v. Hines, Director General,* 103 S. E., 546 (S. C.), holding that "the Director General could not be sued for willfulness." The Virginia court, in passing, said (112 S. E., page 873):

> "Punishment of the offender as a deterrent example to others is the sole justification for awards of punitive or exemplary damages, and *we are unable to perceive any distinction between penalties imposed pursuant to the common law and those imposed by statutory sanction.*"

The decision reported in 118 S. E., 114 (Va.), was on rehearing, and the first question considered was, "Does the statute authorizing an action for insulting words impose a liability upon a master for compensatory damages for insulting words uttered by his agent in the course of his employment when such words are neither authorized nor ratified by the employer?" and (2) "If so, is there any difference in this respect between the Director General of Railroads and any other employer?" The court held that, assuming a corporation would be liable under the circumstances stated, there was a difference in liability as to the Director General, and that the latter would not be liable. The following quotation from pages 115-116 of the opinion gives the reasoning of the court:

> "It seems manifest also that one of the objects of the order was to limit the causes of action upon which

the Government gave its consent to be sued to the classes of cases hereinbefore mentioned. No other reason can be assigned for the classification of the causes of action mentioned in the order. If it was not intended to impose a restriction, there was no necessity or propriety in making the classification, as the statutes otherwise covered the whole ground. The statute, however, while giving very comprehensive rights of action, expressly excepted cases that were inconsistent with 'any order of the President,' and the President deemed it wise to restrict the right to the classes of cases designated in general order No. 50*a*. The term 'claim for death or injury to person' shows plainly that the injury to person referred to was a physical injury to the person, and not an injury to the *feelings or reputation*. He withdrew all other causes of action from the operation of the act, and restricted the right to sue to the classes of cases mentioned.

"There were good reasons for the restriction. The government had assumed large pecuniary obligations, and, while it desired to put the public to as little inconvenience as possible in asserting demands of a substantial nature, it recognized the necessity of conserving the assets of the companies, and to this end cut off the right of recovery of fines, penalties, and forfeitures, *and for invisible injuries the existence of which could not be disproved, and for which the law provided no measure of compensation, such as mental anguish for a private insult.* * * *

"To meet these heavy obligations, it was necessary not only to have a conservative economic administration of the affairs of the railroad companies, but also to cut off litigation of the class of the case at bar, where no physical injury was inflicted, no damage done to property, no contract violated, and where

the scales of justice could not be so adjusted as to measure in dollars and cents the extent of the mental hurt inflicted.

"It is clear from the collocation of the words that mere mental anguish was not an 'injury to person' within the meaning of the general order."

The Virginia court held, and we think its reasoning is sound, that damages solely for mental anguish and wounded feelings caused by the willfull act of an agent of the Director General are not of the kind which the Federal Control Act permits to be recovered against the Government. The vague and unsubstantial character of such damages is commented upon by the Virginia court, and the same views with respect to such damages have been taken by the great majority of State courts and uniformly by the Federal courts.

Nowhere has the illusory and punitive character of such damages been pointed out better than by a late distinguished justice of this court, Mr. Justice Lurton,, while a member of the Supreme Court of Tennessee. In *Wadsworth v. Western Union Telegraph Company,* 8 S. W., 574-582 (Tenn.), Mr. Justice Lurton said:

> "The reason why an independent action for such damages cannot and ought not to be sustained, is found in the remoteness of such damages, and in the metaphysical character of such an injury considered apart from physical pain. Such injuries are generally more sentimental than substantial, depending largely upon physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly com-

> pensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury, with justness, *not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected.*" (Italics ours.)

Another excellent statement of the same principle is found in the case of *Arizona Copper Company v. Burciago,* 177 Pacific, 29-33 (Ariz.), where the Supreme Court of Arizona, in determining what was meant by "compensatory damages" under the Workmen's Compensation Act of that State, said:

> "With equal clearness humiliation and mortification can only result from wrong to the person injured through the intended act of the defendant, and where humiliation and mortification furnish grounds for recovery, the right of recovery depends upon whether the defendant purposely and designedly committed the wrong, thereby intending to humiliate the plaintiff and outrage his feelings.
>
> "The damages recoverable for such wrong are punitive in character and furnish no ground for recovery in this kind of action, for the reason that such character of damages does not amount to actual damages, but to punitive damages."

The amount of the judgment against the Government in the present case well illustrates the wisdom of the opinion of Mr. Justice Lurton in the *Wadsworth* case, *supra,* and, irrespective of the other facts in the case pointing to the

same conclusion, of itself demonstrates that the damages awarded were substantially punitive in character. While petitioner concedes that this court will not review a question involving merely the excessiveness of damages awarded even against the Director General, this court should and will consider the amount of damages awarded as alleged compensatory damages in determining whether the judgment is in fact one for compensation or essentially a judgment inflicting punishment on the Government in the name and under the guise of compensation. This court will determine for itself in such cases whether the award shall be deemed compensation or a penalty. This was specifically held in the leading case of *Missouri Pacific R. Co. v. Ault, supra,* where this court said:

> "The contention that the director general, being the carrier, is liable for the penalty imposed by the Arkansas Statute, is rested specifically upon the clause in section 10, to the effect that the carriers 'shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law,' and the provision in section 15, that the 'lawful police regulations of the several States' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, State and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States, arising out of the operation of the railroad, were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the Government for a penalty, if it should fail

to perform the legal obligations imposed. The Government undertook, as carrier, to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law, but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties, or to permit any other sovereignty to punish it. Congress is not to be assumed to have adopted the methods of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees. The director general adopted a much more effective and direct method: 'Now that the railroads are in possession and control of the Government, it would be futile to impose fines for violations of said laws and orders upon the Government, therefore it will become the duty of the director general in the enforcement of said laws and orders to impose punishment for *willful and inexcusable violations* thereof upon the person or persons responsible therefor.' General Order No. 8, *id.*, p. 167.

"The purpose for which the Government permitted itself to be sued, was *compensation, not punishment.* In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order: 'Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.' Wherever the law permitted compensatory damages, they may be collected against the carrier while under Federal control. Such damages may reasonably include interest and costs. See *Hinds vs. Taylor,* — Fla., —; 84 So., 381. But double damages, penalties, and forfeitures, which do not merely compensate but punish, are not within the purview of the statute. See *Hines*

vs. Taylor, supra; Jackson-Tweed Lumber Co. vs. Southern R. Co., 113 S. C., 236; 101 S. E., 924. The amount recovered in the present case over and above the wages due and unpaid, with interest, is in the nature of a punishment. It is called a penalty in the State statute. The Supreme Court of Arkansas had held that it was not technically a penalty, declaring: 'It is allowed for a double purpose—as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages.' *Leep vs. St. Louis, I. M. and S. R. Co.*, 58 Ark., 407, 440, 441; 23 L. R. A., 264; 41 Am. St. Rep., 109; 25 S. W., 75. But whether in a proceeding against the Director General it shall be deemed compensation or a penalty presents a question not of State, but of Federal law. *Whatever name be applied, the element of punishment clearly predominates, and Congress has not given its consent that suits of this character be brought against the United States.*"

We submit that the present case falls directly within the controlling principles of the *Ault* case. The fact that damages awarded against a railroad company or other defendant in personal-injury actions for mental anguish and humiliation are generally called compensatory damages in a technical sense cannot be given controlling effect to uphold a judgment against the Government where every circumstance points to the conclusion that it is punitive. Here the complaint alleged willfulness, the proof showed it, the trial judge in his order refusing a new trial indicated that he considered the verdict of a punitive character, and the amount of the verdict ($8,660) representing recovery for mental anguish

alone all demonstrate that punishment, and not compensation, is the essence of the judgment.

The courts of other jurisdictions have applied the principles laid down by this court in the *Ault* case, and have recognized that, irrespective of whether a judgment or statute technically involved a penalty, the Government could not be held liable if the element of punishment clearly predominated.

In the case of *Howard v. Davis, D. G.*, 95 So., 354 (Ala.), the Supreme Court of Alabama held:

> "It is true that in the case of *Sou. Ry. Co. v. Bush*, 122 Ala. 470, 26 South. 168, this court held that the homicide statute was not such a penal one, strictly speaking, as to excuse answering interrogatories under the constitutional provision there invoked, but it did not hold that the damages recoverable were not punitive as distinguished from compensatory, just as the Arkansas court held that the statute involved in the *Mo. Pac. R. R. Case, supra*, 'technically' did not prescribe a penalty, yet the Supreme Court of the United States held that, whatever name may be applied to it by the state court, it presented the question of federal, and not of state, law, and that the element of punishment clearly predominated, while the damages provided by our statute, as construed by many decisions of this court, are entirely punitive. As suggested by counsel for the appellant, this result renders our homicide statute abortive and inoperative as to deaths caused by the operation of railroads while under federal control; but we must bow to the highest authority in deciding federal questions, and 'Render, therefore, unto Cæsar the things which are Cæser's.'"

This was said of an action against the Director General under the homicide statute of Alabama, which had theretofore been construed as not to be a penal statute in some respects.

In *Rowell v. Hines*, 103 S. E., 545 (S. C.), the South Carolina Supreme Court itself held that "the Director General could not be sued for willfulness," and also in *Ginn v. U. S. R. R. Administration*, 103 S. E., 548 (S. C.), held that the Director General, representing the Government, cannot be held to respond in punitive damages. This was said in an action by a passenger.

As petitioner has pointed out, the complaint alleges that the acts of petitioner's gateman complained of, which were made the basis of this suit, were both willful and malicious, and respondent's testimony at trial, which was presumably accepted by the jury, clearly sustained this charge and leaves no doubt that the gateman in assaulting, cursing and abusing the petitioner acted willfully and without any apparent purpose of discharging his duties to the Government. Under such circumstances, the South Carolina Supreme Court has in the very late case of *Matthews v. Davis, Director General*, 117 S. E., 642 (S. C.), decided May 16, 1923, that the Government cannot be held responsible.

The action was against the Director General on account of a "willful assault and battery, alleged to have been committed by one M. A. Bell, alleged in the complaint to have been at the time of the assault and battery an agent of the Director General of Railroads." While the facts of the case are not given in the opinion of the Supreme Court, it appears from the record (case and exceptions) in the South Carolina Supreme Court in that case that the employee of the Director

General who made the alleged willful assault was the telegraph operator on duty at the passenger station, and that the plaintiff, Matthews, at the time of the alleged assault had come to the depot with his wife's mother, who was to take the train, so that the plaintiff occupied the position and was entitled to the protection of a passenger. The complaint alleged that plaintiff asked the operator when the train would arrive and received an impertinent answer, and that the operator then berated the plaintiff with opprobrious epithets, and without any provocation or just cause then and there committed a vigorous, willful, wanton and malicious assault upon plaintiff and struck, cut and bruised him with a knife, etc. Plaintiff's testimony fully sustained the above allegation, but there was testimony for the Director General to the effect that plaintiff himself began the trouble and provoked the assault. The South Carolina Supreme Court held that there could be no recovery. It said:

> "A careful examination of the evidence convinces us that there was no element of negligence in the case; whether the assault and battery was unprovoked, or whether Bell was defending himself, makes no difference. *The Government is not responsible for a willful assault and battery by a party in its service, in the absence of any statute by Congress making it liable and allowing the Government to be sued,* and we know of no such authority authorizing suit by plaintiff, in this case or any one similarly situated. The Government cannot be sued and made liable without its consent, given in some act of Congress, for torts, misconduct, misfeasance, or laches of its officers or employees. *Bigby v. United States,* 188 U. S., 400; 23 Sup. Ct., 468; 47 L. Ed., 519; *Hill v. United*

States, 149 U. S., 593; 13 Sup. Ct., 1011; 37 L. Ed., 862; *Gibbons v. United States,* 8 Wall., 269; 19 L. Ed., 453.

"No specific authority conferred by Congress has been cited to allow the plaintiff to recover in the case before us, for we think it is an attempt to recover on account of a willful tort committed by an alleged agent and employee of the Government.

"*Missouri Pacific R. Co. v. Ault,* 256 U. S., 554; 41 Sup. Ct., 593; 65 L. Ed., 1087, decides that actions against the Director General of Railroads can be such only as are authorized by acts of Congress."

The petitioner submits that the decision of the South Carolina Supreme Court in the *Matthews* case, *supra,* which was rendered *after* the decision in the case under review herein, is correct, although it appears to clearly conflict with its decision in the present case. As above noted, it is both alleged and proved herein that the acts of petitioner's gateman, while committed in the line of his duties, were willful and wanton, and done without any excuse, either offered or apparent. We think, therefore, that the later decision of the Supreme Court of South Carolina in the *Matthews* case affords ample authority for the reversal of the judgment in the present case. It is noticeable that the justice who rendered the opinion and judgment in the present case (Marion, A. J.) dissents in the *Matthews* case.

As persuasive authority in line with the cases herein discussed, including, we think, the *Ault* case, we call attention to the case of *Davis, agent, v. McMillan,* 115 S. E., 494 (Ga.), decided January 20, 1923, by the Supreme

Court of Georgia. This was an action against the Director General of Railroads for a malicious prosecution, claiming punitive and compensatory damages. The court considered the question of whether damages for a malicious prosecution, though alleged to be "compensatory," were chargeable against the United States or its agent. It held:

> "As we construe the petition to which the demurrer was interposed, it is purely a suit which seeks to recover damages for an act based upon malice. Without the element of malice, the entire structure of the suit must collapse. All parts of the petition which sought to recover what was in terms called punitive damages were stricken; and although, under the ruling of the trial court and the Court of Appeals, the recovery was restricted to what was termed 'compensatory' damages, we think that the name 'compensatory,' as applied therein, does not change the basic fact that the recovery is sought for an act which can authorize only punitive damages. Any damages recovered under the petition as it stands would amount to a penalty for a malicious act; and for this neither the United States, nor its agent, the Director General of Railroads, can be held liable."

It may be here noted that the authorities are not uniform as to whether an action for malicious prosecution may be maintained against the Director General. In the case of *Dougherty v. Payne, Director General of Railroads*, 276 Fed., 451, the District Court for the Southern District of Florida held, without extended discussion, that such an action obviously could not be maintained. This decision was reversed by the Circuit Court of Appeals, 5th Circuit, in *Dougherty v.*

Payne, 291 Fed., 61. While it may be that the decision of the Circuit Court of Appeals is contrary to the principles laid down by this court in its recent decision in the *Kastenbaum* case, hereinafter mentioned, it is sufficient for present purposes to say that the decision in the *Dougherty* case does not militate against the position of petitioner herein; for the Circuit Court of Appeals was careful to point out that the prosecution complained of therein "was resorted to as one of the methods of protecting such property, and clearly related to the operation of the Pullman Company's business as a carrier, as distinguished from a corporate act wholly foreign to such operation." The willful cursing, assaulting and abusing of a passenger by a train gateman certainly is not one of the usual methods of discharging his duties to the public or in any sense adapted to that end. Likewise the court pointed out that compensatory damages only were recoverable and cited as controlling authorities the *Ault* case, the case of *Hines v. Gravins* (*Va.*), 112 S. E., 869, discussed herein, and *Davis v. McMillan* (*Ga.*), 112 S. E., 913. The *Georgia* case was later reversed by the Supreme Court of Georgia, and the *Virginia* case and its companion decision, reported in 118 S. E., 114, *supra,* clearly indicate that neither punitive damages nor damages for humiliation and mental anguish in the guise of compensatory damages can be recovered against the Director General.

See, also, in connection with the general question of responsibility for willful and malicious acts of an employee, the recent decision of this court in *Davis, Director Genearl, v. Green,* 67 L. Ed., 139 (Adv. Op., Jan. 1, 1923). Here this court held that the Director General was not liable for a willful act of his employee (homicide) done wholly out-

side the scope of his employment, but while his employment was going on, irrespective of whatever might be the local law of Mississippi, on the question. The gatekeeper's conduct in the present case was undoubtedly willful. When plaintiff told the gateman, Crosswell, what the ticket agent said about plaintiff going through, the gateman replied that "he didn't care what the ticket agent or Mr. Hare, the superintendent, or anyone else said, he would not let him through; he was running that gate."

In the case of *State v. Hines, agent,* 228 S. W., 667 (Texas), the Texas Court of Civil Appeals held that an action for penalties did not lie against the Director General of Railroads for failure to keep well lighted the closets and adjacent depot grounds maintained at passenger stations under State statute imposing a penalty for failure to keep such places lighted. The court said that the statute was penal in its nature and not enforceable against the Government.

There is nothing, we submit, in the recent decision of this court in *Director General of Railroads v. Kastenbaum,* 68 L. Ed., 84 (Adv. Op., Dec. 1, 1923), decided November 12, 1923, which is contrary to our position herein. This was a suit brought against the Director General for damages for false imprisonment and malicious prosecution. The trial court dismissed the cause of action for malicious prosecution, but entertained the action for false imprisonment, and judgment for plaintiff for $500 therein was rendered against the Director General. This court, after citing General Order No. 50 and the *Ault* case, upheld such judgment as limited to the recovery of "compensatory damages," and in the course of its opinion said:

> "The action for false imprisonment is in the nature of a trespass for a wrong or illegal act in which the defendant must have personally participated, directly or by indirect procurement. The gist of it is an unlawful detention and, that being shown, the burden is on the defendant to establish probable cause for the arrest. The want of probable cause, certainly in the absence of proof of guilt or conviction of the plaintiff, *is measured by the state of the defendant's knowledge, not by his intent.* It means the absence of probable cause known to the defendant when he instituted the suit. *But the standard applied to defendant's consciousness is external to it.* The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did."

The court added:

> "But as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable."

It will be observed that this court was careful to point out that the want of probable cause, which has the effect of making the unlawful imprisonment actionable, is not a matter of defendant's "intent," but is a matter of his "knowledge," and that the standard of responsibility to be applied is external to defendant. In other words, a defendant may become liable in an action for false imprisonment with the best of intentions or irrespective of his intent. The *Kastenbaum* case, therefore, is clearly distinguishable from the present case, where the assault and abuse of petitioner's agent is alleged to be, and necessarily is, willful; rather the *Kastenbaum* case, by its reasoning, sustains our contention

herein, in that it clearly implies that the decision might be otherwise in a suit involving a willful and intentional wrong done by the agent of the Government where the question of intent is of the essence of the action.

Furthermore, in the present case the record shows that the judgment was essentially and substantially of a punitive character and cannot reasonably be given any other construction, while in the *Kastenbaum* case, not only was the recovery limited to compensatory damages by the instructions of the court, but there was nothing in the facts surrounding the trial or in the amount recovered to indicate that the element of punishment predominated.

As petitioner has heretofore pointed out, this court has held in the *Ault* case, *supra,* that whether a recovery be deemed compensation or a penalty presents a question of Federal and not State law, and that a judgment against the Director General will be set aside if the element of punishment clearly predominates, whatever name be applied to the recovery. This principle is general and necessary, as well in matters of substantive law as in matters of local practice. *Davis, Director General, v. Wechsler,* 68 L. Ed., 5 (Adv. Op., Nov. 1, 1923). The pleadings, the evidence in the case, the trial judge's order denying a new trial, and particularly the exceedingly large amount of recovery compared with the slight actual injury, all clearly point to the fact that the judgment against the Government herein was essentially of a punitive character, and the mere fact that it is denominated compensatory by the State courts cannot alter that fact. If such a judgment in such an amount can be sustained against the Director General, then the rule that the Government cannot be punished because of the willful acts of its agent, enunciated by the act of Congress, the orders of the Director Gen-

eral, and the decisions of this and other courts becomes a mere hollow formula, which can and will be readily circumvented by verdicts and judgments such as that here involved, which inflict enormous punitive damages upon the Government under the guise and technical classification of compensation. If the judgment against the Director General herein of $8,660 for humiliation can be sustained as being substantially compensatory in character, which it must be in order to sustain the judgment, there is no reason why a judgment for $18,000 or for any sum which should strike the fancy of the jury should not be sustained on the same theory.

Conclusion.

The petitioner submits that the judgment under review is clearly unauthorized and unlawful as against the Director General of Railroads, first, because the element of punishment clearly predominates in the judgment and it in effect imposes large punitive damages upon the Government and damages of an uncertain, speculative and metaphysical character; and, second, because it imposes a liability on the Government for the willful and malicious acts of its agent done in the course of his employment, but without any apparent relation thereto.

Respectfully submitted,

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WILMINGTON, N. C., *March* 19, 1924.